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### CPLR 3213: Defendant's Failure to Answer Motion for Summary Judgment Does Not Allow a Default Judgment in Action Prior to Return Date of Motion

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It is also to be noted that the court in *DiBartolo* punished the plaintiff even though defendant had not made a motion to compel disclosure under CPLR 3124.<sup>157</sup>

Another recent case in the third department has also applied similar penalties where the defendant willfully refused to comply with disclosure orders in connection with an examination before trial.<sup>158</sup> However, it is to be noted that here the plaintiff had moved to punish the defendants for contempt. In denying the motion the court added that such motion may be renewed if more drastic punishment is necessary to secure defendant's compliance with the disclosure orders.<sup>159</sup> Accordingly, the court ordered the imposition of court costs and counsel fees, in addition to requiring that the disclosure proceedings be continued. Although the court indicated it would not adjudge the defendant to be in contempt, it clearly stated that such remedy was available if future conduct justified its use.<sup>160</sup>

As a result of these cases, the courts now seem to be willing to apply more stringent penalties for refusing to obey a court order for disclosure. However, the question of whether the courts will impose a contempt penalty for violation of CPLR 3126 remains unanswered. Due to the heavy amount of litigation in this area, it is to be expected that the question will soon be resolved.

#### ARTICLE 32 — ACCELERATED JUDGMENT

*CPLR 3213: Defendant's failure to answer motion for summary judgment does not allow a default judgment in action prior to return date of motion.*

As originally enacted, CPLR 3213<sup>161</sup> limited a defendant to a twenty-day answering period subsequent to service of a summons and notice of motion for summary judgment. Since such an inflexible time period was inconsistent with the variety of answering

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<sup>157</sup> CPLR 3103; *Mostow v. Shorr*, 44 Misc. 2d 733, 255 N.Y.S.2d 320 (Sup. Ct. Kings County 1964).

<sup>158</sup> *Warner v. Bumgarner*, 49 Misc. 2d 488, 267 N.Y.S.2d 825 (Sup. Ct. Monroe County 1966).

<sup>159</sup> *Id.* at 493, 267 N.Y.S.2d at 830.

<sup>160</sup> *Ibid.* One commentator believes that the remedy of contempt is available under this section, 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3126.06 (1965), whereas another believes that CPLR 3126 is "a preemptive statement of the remedies that may be sought for a party's failure to disclose," 7B MCKINNEY'S CPLR 3126, supp. commentary 76, 82 (1964), and that contempt is not available.

<sup>161</sup> Originally CPLR 3213 provided: "When an action is based upon a judgment or instrument for the payment of money only, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of complaint, returnable at least twenty days after service." (Emphasis added.)

periods found in CPLR 320(a),<sup>162</sup> the Judicial Conference proposed an amendment,<sup>163</sup> enacted in 1965, to eliminate the conflict. Under the amended version of CPLR 3213, defendant has an additional ten days in which to respond to plaintiff's motion for summary judgment in lieu of complaint, if he is not served personally within the state.

Legislative history does not show, however, that reference to CPLR 320(a) time periods in CPLR 3213 would necessitate application of corollary section 3215,<sup>164</sup> allowing default judgments for failure to appear. In establishing more equitable time periods, the legislature seems not to have considered the situation in which, as in *Knudson v. Flynn-Hill, Knudson Elevator Corp.*,<sup>165</sup> the defendant made no attempt to answer the motion papers, but merely appeared in court on the return date of the motion. When the defendant appeared in court to answer the motion, he learned that it was no longer on the calendar, a default judgment having been entered on the date he was to have served an answer to the plaintiff's motion.

Plaintiff argued that since CPLR 305(b) notice had been served on the defendant, the latter's failure to answer the motion constituted a failure to appear in response to the summons, empowering the clerk to enter a default judgment prior to the return date of the motion.

The court rejected this argument, however, taking into consideration the "newness of the amendment,"<sup>166</sup> the operation of the section as "a trap to the unwary,"<sup>167</sup> and, most importantly, the specific language of CPLR 3213 and 3215. Since CPLR 3213 speaks only of answering the motion and does not mention an appearance by the defendant as does 3215, the court reasoned that failure to answer the motion is a default on that motion only,

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<sup>162</sup> CPLR 320(a) states that defendant must appear within twenty days, if summons was personally served upon him within the state. Absent personal service, he must appear within thirty days. In all other cases, he must appear within thirty days of service.

<sup>163</sup> 1965 JUD. CONF. REP. 71-72.

<sup>164</sup> CPLR 3215 states: "When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial . . . the plaintiff may seek a default judgment against him."

<sup>165</sup> 49 Misc. 2d 78, 266 N.Y.S.2d 897 (Sup. Ct. Queens County 1966).

<sup>166</sup> *Knudson v. Flynn-Hill, Knudson Elevator Corp.*, 49 Misc. 2d 78, 80, 266 N.Y.S.2d 897, 899 (Sup. Ct. Queens County 1966). CPLR 305(b) creates a unique type of notice which states the sum of money for which judgment will be taken in case of default. This provision can be used when a sum certain or a computably certain sum is in issue.

<sup>167</sup> *Knudson v. Flynn-Hill, Knudson Elevator Corp.*, *supra* note 166, at 81, 266 N.Y.S.2d at 900. See also *Paul v. Weiss*, 48 Misc. 2d 683, 265 N.Y.S.2d 687 (Sup. Ct. Sullivan County 1965) (court accepted reply affidavits, although in default, in view of the newness of the rule and lack of a CPA predecessor).

and not a default in the action itself.<sup>168</sup> Furthermore, since the three methods of appearance specified in CPLR 320(a) do not include the service of an answer to a motion,<sup>169</sup> it was held that defendant could not be considered in default until the return date of the motion. Thus, this decision interprets the reference to CPLR 320(a) in CPLR 3213 as merely setting forth the time allowable for the return of motion papers, rather than as giving an exact date upon which a defendant will automatically be in default.

The opinion of the court in the principal case is consistent with the purpose and spirit of the legislation. That purpose is "to destroy the delay incident upon waiting for an answer and then moving for summary judgment."<sup>170</sup> The Judicial Conference designed the amendment "to allow plaintiff time to study the answering papers. . . ." <sup>171</sup> This more simple, direct, time and expense saving procedure can not be considered so desirable as to allow a defendant to be deprived of his day in court. Moreover, there is no undue delay in the disposition of meritorious claims inherent in a rule which prevents a default judgment in the brief span between the date set for service of answering papers and the return date.

*CPLR 3216: Court can dismiss for want of prosecution on basis of "general delay."*

The calm in the plaintiffs' bar created by the interpretation that *Salama v. Cohen*<sup>172</sup> destroyed general delay as an independent basis for a CPLR 3216 motion, was, viewed retrospectively, the quiet before a storm. Ignoring those who considered *Salama* the last word on the interpretation of the 1964 Volker Amendment, the Court of Appeals in *Commercial Credit Corp. v. Lafayette Lincoln-Mercury, Inc.*<sup>173</sup> restricted the applicability of the forty-five day demand requirement solely to motions based on failure to file a note of issue. Simultaneously, the Court recognized the existence of unreasonable "general delay" as a separate basis for dismissal for want of prosecution.

With this recognition of general delay, the controversy surrounding the extensiveness of the 1964 amendment has come full

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<sup>168</sup> *Id.* at 80, 266 N.Y.S.2d at 899.

<sup>169</sup> *Supra* note 163, at 30. Any extension (up to 10 days) over the minimum period provided by CPLR 320(a), granted by the plaintiff, entitles him to a copy of the answering papers that many days before the return date of the motion.

<sup>170</sup> *Knudson v. Flynn-Hill, Knudson Elevator Corp.*, *supra* note 166, at 81, 266 N.Y.S.2d at 900.

<sup>171</sup> 7B MCKINNEY'S CPLR 3213, commentary 817 (1963).

<sup>172</sup> 16 N.Y.2d 1058, 213 N.E.2d 461, 266 N.Y.S.2d 131 (1965); see 40 ST. JOHN'S L. REV. 303, 340 (1966).

<sup>173</sup> 17 N.Y.2d 367, 212 N.E.2d 271, 272 N.Y.S.2d 218 (1966).